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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. .

ROBERT LOPEZ,

Petitioner,

v.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States,

Respondent, American-Hawaiian Steamship Company, respectfully shows to this Honorable Court as follows:

COUNTERSTATEMENT OF THE CASE.

We believe that a counterstatement of the case is required in order to clearly understand what the Court of Appeals decided and the problem which this Court is asked to decide.

The Petitioner, Robert Lopez, was a longshoreman employed by Luckenbach Steamship Company, Inc., (hereinafter referred to as Luckenbach). Luckenbach is a corporation engaged primarily in the steamship business but it also operates an autonomous division which performs stevedoring and all types of longshore work not only for its own vessels but as an independent contractor for other shipowners.

The respondent, American-Hawaiian Steamship Company, operates a steamship business and was the bareboat charterer and owner pro hac vice of the Steamship "Willis Vickery".

A contract was entered into between the respondent and Luckenbach under which Luckenbach undertook to perform all of the services connected with the loading and unloading of respondent's vessels at Philadelphia. The contract is in evidence (D 13a) [1] and delineates the work to be performed for respondent by Luckenbach. There is no question but that Luckenbach is an independent contractor.

In May of 1948 the "Willis Vickery" arrived in Philadelphia and docked at a pier owned and operated by Luckenbach. In accordance with the contract, Luckenbach's longshoremen commenced the loading of cargo. When the vessel arrived and the Luckenbach employees went aboard, all of the hatches at the main deck and the lower deck levels were covered. In accordance with the contract between Luckenbach and the respondent, the Luckenbach employees opened hatches (D 14a) as necessary to enable them to perform their work (D 17a).

The Petitioner worked for Luckenbach as a carpenter. His work was in connection with and essential to the proper performance of the stevedoring work which Luckenbach undertook to perform for the respondent. The cargo stowed by Luckenbach had to be shored so that it would be held firmly in place during the voyage and it was this placing of dunnage and erecting of shoring which the Petitioner and other Luckenbach carpenters performed.

The "Willis Vickery" has five decks (D 6a, 18a, Plt. Exhibit 1 & 2). These are designated by letters, the main deck being "A" and the space above the lower hold being designated as "D" level. The lower hold is not designated by a letter but in this record is referred to simply as the lower hold (D 18a).

On May 3, 1948, Luckenbach had loaded cargo into the "D" level of the No. 2 hold (D 18a, 19a). The record is not clear whether the carpenters' work followed the stevedores or whether the carpenters worked on the "D" deck level

1. Record references are to the appendices filed in the court below. The prefix P refers to Petitioners appendix, D to Respondents.

along with the stevedores. The point is not material to the present case.

On May 3, 1948, the Petitioner was put to work by Luckenbach shoring cargo on the "D" deck level of No. 2 hold (D 20a). There the hatch boards covered the opening into the lower hold. At the time the "Willis Vickery" arrived alongside the pier, all of the hatch covers in the No. 2 hold were in place, including the covers at all of the decks "A" through "D". As it was required to do under its contract (D 17a), Luckenbach removed all hatch covers necessary for performance of its loading function and its employees removed the covers at decks "A", "B" and "C" of the No. 2 hatch. It was necessary to remove these covers to give access to "D" deck where cargo was loaded (D 19a).

Petitioner was assigned by Luckenbach to place dunnage and shoring around the cargo which Luckenbach had loaded onto "D" deck in No. 2 hold. This work he performed all during May 3, 1948 until 5:00 P. M. when Petitioner and the other *carpenters* left for the day. The work of loading, performed by Luckenbach stevedores, continued during most of the night (D 12a).

When the stevedores, employed by Luckenbach, finished loading cargo at Pier 84, they did not close all of the hatches they had opened (D 10a). They did put on the hatch covers at the main or "A" deck level (D 9a), leaving open the hatch openings at "B" and "C" deck levels. The stevedores then left and the ship was shunted across the Delaware River from Pier 84 to the Camden Marine Terminal which is across the River and several blocks north. When the ship arrived at the Camden Marine Terminal, the next shift of Luckenbach stevedores was waiting to go aboard. With them were the Luckenbach carpenters who had worked on the vessel the preceding day and among them was the petitioner. As soon as the gangway was lowered, Petitioner and the other Luckenbach employees went on board (D 3a). Petitioner reported to his foreman who directed him "to get his tools and go to work in No. 4 hold" (D 3a).

When Petitioner had been working in No. 2 hold the day before he had left his tools there on "D" deck level. Intending to get his tools from that place, he entered a small hatch, known as the escape hatch, inside of which was a stairway. He descended until he reached the level which he believed to be the same level upon which he had worked the preceding day. He came out of the escape hatch and walked in complete darkness across the deck. At one point he struck a match and immediately thereafter fell.

The hatch covers were removed and it was not until then that Petitioner was found at a level below the one from which he had fallen (D 8a). The incontrovertible physical facts show that Petitioner had come out of the escape hatch trunk at one of the upper levels where the hatch covers were off in the belief that he was on "D" deck and that he fell through an opening which had been created by the Luckenbach employees when they opened the hold down to "D" deck level in order to load cargo. The opening had not been covered over when the Luckenbach *stevedores* finished work during the early morning hours of May 4th (D 9a).

The case proceeded to trial and the jury disagreed. Thereafter, Respondent filed a motion for judgment on the whole record. This was a follow-up of Respondent's motion to dismiss the case at the close of all the evidence. The District Court granted Respondent's motion for judgment without opinion.

On appeal, the Court of Appeals for the Third Circuit affirmed that judgment in an opinion by Judge McLaughlin which is reported at 201 F. 2(d) 418.

ARGUMENT.

The Two-Court Rule.

Two Courts have already passed upon the case at bar. Essentially the case presents only fact questions which do not merit consideration by this Court.

There Is No Conflict.

There is no conflict between the case at bar and any case in any other Circuit. Neither is there conflict with any decision of this Court. We find it difficult to follow the argument presented by the petition and brief, but it seems to assert conflict between this case and this Court's decision in *Seas Shipping Co. v. Sieracki,* 328 U. S. 85. As losing counsel in the *Sieracki* case we consider ourselves third rate authorities on what that case holds. First of all there is an immense factual difference. In *Sieracki,* an appliance furnished by the shipowner to the stevedore failed in normal use because of a latent defect in the structure. Here, the petitioner fell through an open hatchway which had been covered when his employer began his work, had been opened by the employer and left open by him in the course of the work the petitioner's own employer was performing. We fail to see any similarity between those facts and the facts of the *Sieracki* case. The Court of Appeals apparently could not see any unseaworthiness of the vessel in those facts and neither can we.

For a stevedore to remove a perfectly sound hatch cover and leave the hatch opening temporarily unguarded on a vessel loading cargo in a safe port would hardly seem to warrant applying the label "unseaworthy" to the vessel. Negligence on the part of the petitioner's employer there may be but he has had his remedy under the Compensation Act for that.

In the case at bar, the peril was created by the fellow employees of the petitioner. In *Sieracki* the peril was not

known to either the shipowner or the stevedore. In the *Sieracki* decision, 328 U. S. 85 at 95 this Court was stating the rationale of the decision and said:

> "The latter [the stevedore] ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them."

Here we are dealing with a case where the employer's "own acts" created the "perils" which caused injury to his employee. We can see nothing in the *Sieracki* case which supports the argument which the Petitioner makes to this Court.

If anything has been established in the law with regard to suits by employees of independent shoreside contractors since this Court's decision in the *Sieracki* case, it is that the obligation which a shipowner owes to the employees of an independent contractor is to use reasonable care to turn over to the contractor a place of work which is reasonably safe *at the time the contractor's employees assume control over the place of work.* If thereafter the employees of the contractor create an unsafe condition which causes injury to an employee of the contractor the vessel is not liable for the injury thus sustained. In *Lynch v. United States,* 163 F. (2d) 97, the Court of Appeals for the Second Circuit states the rule as follows:

> "It is further pointed out however that when he [the shipowner] surrenders control of part of his ship to the stevedores his duty as to the part surrendered extends only up to the time the stevedore assumes control." Citing cases. "If thereafter the agents of the stevedore cause a dangerous condition, the shipowner is not liable for accidents resulting from it."

That rule has been followed many times. *Goldberg v. United States,* 91 F. Supp. 104; *Cioffi v. New Zealand Shipping Co.,* 80 F. Supp. 98; *Eagle Indemnity Co. v. United States Lines,* 86 F. Supp. 949; *Peterson v. United States,* 80 F. Supp. 84; *Osnovitz v. United States,* 103 F. Supp. 241.

The rule thus enunciated is in accord with the *Restatement of Torts.* § 343 of the *Restatement* reads, in pertinent part, as follows:

> "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artifical condition thereon, if, but only if, he
>
> (a) knows, or by the exercise of reasonable care, could discover the condition which, if known to him, he should realize as involving an unreasonable risk to them, and
>
> (b) has no reason to believe that they will discover the condition or realize the risk thereon . . ."

In the case at bar *all* of the hatch covers at *all* of the deck levels had been in place when the Luckenbach employees began their work. In order for Luckenbach to perform *its* work it was necessary for *it* to remove certain hatch covers. In order for the petitioner to have worked on "D" deck on May 3rd and shore up the cargo which Luckenbach's stevedores had loaded into "D" deck it was necessary that Luckenbach remove the hatch covers at decks "A", "B" and "C". This they did and when the petitioner and the other Luckenbach carpenters finished work at 5:00 P. M. on May 3rd the covers at one or more of the lower decks were left off. The petitioner left his tools on "D" deck when he left for the day. Luckenbach's *stevedores* remained on the vessel and continued working after 5 o'clock.

There is no question but that Luckenbach was obligated to and did in fact remove and replace the hatch covers (D 14a, 9a, 20a, 21a). When the Luckenbach employees finished work in the early morning hours of May 4th they replaced only the hatch cover at the main deck level (D 21a).

Luckenbach had not completed its work in the No. 4 hold and was still in control of it when the accident occurred.

On the morning of May 4th the petitioner again reported on board the vessel. The main deck hatch covers at the No. 4 hatch were on and the hatch was in the same condition in which the Luckenbach stevedores left it when they stopped work earlier that morning. The petitioner's foreman employed by Luckenbach directed that the petitioner work in the No. 2 hatch instead of resuming his work on "D" deck level of the No. 4 hold. Unknown to anyone but himself, and possibly his own employer, petitioner had left his tools on No. 4 "D" deck when he stopped working on the preceding afternoon. His foreman told him to get his tools and report inside the No. 2 hold. He went to a small opening called the escape hatch and started down the stairway leading to the decks below. He does not know at which level he left the escape hatch but the undisputed, and in fact only, evidence on the point is that when he was found after the accident he was on one of the lower deck levels at which the hatch covers were in place.

The conclusion is inescapable that petitioner left the escape hatch at one of the levels above "D" deck and, walking in complete darkness, stepped into an opening which had been created when the Luckenbach stevedores had removed the hatch boards at "B" or "C" deck and had not replaced them when they concluded their work earlier that day.

The only change which had occurred in the place where the petitioner worked from the time he left it at 5 P.M. on May 3rd until approximately 10 A. M. on May 4th was that the Luckenbach stevedores had replaced the hatch covers at "A" deck level and thus cut off all natural illumination into the lower holds.

There is not one word of evidence that any of the ship's officers knew or had reason to know where the petitioner had left his tools (D 12a) or that he would attempt to enter one of the lower decks before the lights had been

turned on (D 8a) or the hatch covers at "A" deck had been removed so as to admit natural light.

We suggest that it is neither correct nor fair argument for the Petitioner to state that the Court of Appeals in this case has stricken down or even touched the rule of the *Sieracki* decision. What the Court of Appeals has held is that the shipowner is not responsible in damages to the employee of a shoreside contractor who has been injured by reason of the negligence of his own fellow employees in failing to cover or otherwise safeguard an opening which they created.

The Petitioner's Brief speaks of a theory of "control" but rightly understood the duty of care owed to the Petitioner was owed by the party in control of the place of work. Cf. *Lynch v. U. S., supra; Grasso v. Lorentzen,* 149 F. (2) 127, cert. den. 326 U. S. 743; *Cullings v. Goetz,* 256 N. Y. 287; *Harris v. Lewistown Trust Company,* 326 Pa. 145; *Valles v. Peoples-Pittsburgh Trust Company,* 339 Pa. 33; *Zisman, Executor v. Duquesne City,* 143 Pa. Sup. 263. No rule and no decided case of which we have knowledge either in the field of maritime law or elsewhere requires an owner who has temporarily surrendered control of a portion of his premises to a contractor to so supervise the details of the work being performed by the contractor so that the owner is liable in damages to one of the contractor's employees injured through the negligent manner in which the contractor performs the work. The Petitioner's argument is possibly best answered by the following quotation from a subsequent decision by the Court which decided this case.

> "To us this argument approaches the transferral of a doctrine of attractive nuisance from children to seamen. With all reasonable solicitude for the welfare for those who work on the sea and its margins, we think it is going too far to say that a shipowner is negligent for leaving both light and heavy lumber within the reach of stevedores because one of them might mis-

takenly use the light for purposes for which it should be plain that only the heavy is adapted." *Brabazon v. Belships Co.,* 202 Fed. (2d) 904 at 907.

In the *Brabazon* case the Court of Appeals for the Third Circuit cited its decision in the case now at Bar and said that it involves no general rule of absolution from responsibility. It permits different conclusions as to liability on the basis of relatively small factual differences. 202 Fed. (2d) at 306.

The Petitioner cites *Mollica v. Compania Sud-Americana de Vapores,* 202 F. (2d) 25 (C. A. 2) as if it were in conflict. It is not. That case turned upon the duty to furnish illumination. The vessel in that case assumed the duty to furnish light in the contract and by actually undertaking performance. In that case, between shifts, a ship's mate had actually gone in and inspected the working place, including the very hazard which caused the injury. Here, the most the Petitioner can say is that there is testimony that one of the mates "might" have gone into the working place as a sort of fire watch.

CONCLUSION.

The decision below involves no conflict. It has been decided against the Petitioner by two lower Courts and involves no new or important legal principle. Rather it applies well established rules of law and logic to an atypical factual situation. It does not merit review by this Court.

Respectfully submitted,

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